RECENT DECISIONS.

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AGENCY—CONTRACT FOR AN UNINCORPORATED ASSOCIATION—LIABILITY OF AGENT.—The plaintiff brought an action on a contract made by the defendant in behalf of an unincorporated association. *Held,* a verdict for the defendant was contrary to the law and evidence. *Summerhill* v. *Wilkes et al* (Tex. 1910) 133 S. W. 492.

Although an agent, who without authority purports to contract for a principal, is liable to the third party for breach of an implied warranty of his authority, 10 COLUMBIA LAW REVIEW 567, or in an action of deceit if the representation be fraudulent, Huffcut, Agency 232, it is well settled that he does not render himself liable on the contract, *Jenkins* v. *Hutchinson* (1849) 13 Q. B. 744; *Noyes* v. *Loring* (1867) 55 Me. 408, since he has no intention of binding himself. *Duncan* v. *Niles* (1863) 32 Ill. 532. This reason seems equally applicable where the principal for whom the agent acts is legally incapacitated to contract, but it has been held that in such a case the agent may be sued on the contract itself. *Weare* v. *Gove* (1862) 44 N. H. 196; *Lewis* v. *Tilton* (1884) 64 Ia. 220. However, where all the facts upon which an agent bases his authority are within the knowledge of the third party, by the general rule the former incurs no liability whatsoever, whether his failure to bind his principal be due to his lack of authority in point of fact, see *Newman* v. *Sylvester* (1873) 42 Ind. 106, or to his principal's incapacity to contract in point of law, *Beattie* v. *Lord Ebury* (1872) L. R. 7 Ch. App. 777; *Michael* v. *Jones* (1884) 84 Mo. 578, nor is he accountable for money received under the contract where he has in good faith turned it over to the principal. *Jefts* v. *York* (Mass. 1852) 10 Cush. 392; see *Hall* v. *Lauderdale* (1871) 46 N. Y. 70. Since in the principal case the defendant concealed no fact pertaining to his authority, there appears to have been merely a mutual mistake of law and the decision therefore seems indefensible.

CONSTITUTIONAL LAW—DUE PROCESS—SERVICE OF PROCESS BEYOND THE JURISDICTION.—In a personal action, the defendant resident in Iowa, was personally served outside of the State, in accordance with statutory authorization. Judgment was rendered against him without appearance on his part. *Held,* two judges dissenting, the judgment was invalid, because violative of due process. *Raher* v. *Raher* (Ia. 1911) 129 N. W. 494. See Notes, p. 352.

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—TAX UPON DEFEATED DEFENDANTS.—Under a statute imposing "a tax of three *per centum* on the full amount of each and every judgment rendered by a jury in courts of record" such an amount was taxed upon the defendant as costs. *Held,* since the tax was one upon defeated defendants in actions for the recovery of money judgments, the statute was unconstitutional as denying the equal protection of the laws. *St. Louis I. N. S. Ry. Co.* v. *Pritchard* (Ark. 1910) 133 S. W. 176.

The equal protection clause of the Fourteenth Amendment as applied to taxation prohibits the legislature not only from discriminat-

ing against persons or property within a given class, Cooley, Taxation 77, 255, but also from arbitrarily taxing one kind of property, transactions or persons under the pretext of classification where no distinguishing features exist bearing a relation to the nature of the tax. See *Magoun* v. *Ill. Trust & Savings Bank* (1897) 170 U. S. 283, 293; *Gulf, Col. & Santa Fé Ry.* v. *Ellis* (1896) 165 U. S. 150. So a tax on persons of a certain color or opinion would be objectionable, see *Amer. Sug. Ref. Co.* v. *Louisiana* (1900) 179 U. S. 89, 92; Cooley, Taxation 78, as also a tax on convict-made goods. 10 COLUMBIA LAW REVIEW 476. If, however, the classification rests upon some reasonable consideration of difference or policy, it does not violate the guaranty of equal protection. *Magoun* v. *Ill. Trust & Savings Bank supra; Brown-Forman Co.* v. *Kentucky* (1910) 217 U. S. 563, 573. While the courts refuse to lay down a fixed test of what is a reasonable classification, *Bell's Gap R. R. Co.* v. *Pennsylvania* (1889) 134 U. S. 232, classifications based on the desire to promote a particular industry, *Amer. Sug. Ref. Co.* v. *Louisiana supra,* or on the ability to pay the tax, see *Knowlton* v. *Moore* (1900) 178 U. S. 41, 109, have been upheld. Furthermore, it would seem proper to create a class for the purposes of taxation because of convenience in collection. See *N. Y. ex rel. Hatch* v. *Reardon* (1906) 204 U. S. 152, 158. In the principal case, as there was evidently no intent to discriminate against any group of persons, and the tax was obviously created because easily collectible, there would seem to be no reason for holding it unconstitutional.

CONSTITUTIONAL LAW—INVOLUNTARY SERVITUDE—BREACH OF LABOR CONTRACT.—A statute imposed a criminal penalty for the refusal to perform a contract of employment without just cause by an employee who had not returned the advances received thereunder, if done with intent to defraud. The defendant was convicted under an amendment making the above facts *prima facie* evidence of such an intent. *Held,* the statute as amended was unconstitutional. *Bailey* v. *State of Alabama* (1911) 219 U. S. 219. See Notes, p. 363.

CORPORATIONS—TORTS—SLANDER WITHIN SCOPE OF AGENT'S AUTHORITY. —In an action of slander for defamatory words spoken by a foreman of the defendant corporation a general demurrer was interposed by the defendant on the ground that it was not alleged that the words complained of were expressly authorized by the corporation. *Held,* the complaint failed to state a cause of action. *Jackson* v. *Atlantic etc. R. Co.* (Ga. 1911) 69 S. E. 919.

The doctrine, once recognized, that a corporation cannot be held liable for torts in which proof of malice or intent is essential, *Childs* v. *Bank* (1852) 17 Mo. 213, has long been abandoned, *Boogher* v. *Life Assn. of America* (1882) 75 Mo. 319, and corporations are now held liable in tort for conspiracy and deceit, 9 COLUMBIA LAW REVIEW 78, malicious prosecution, *Dwyer* v. *St. Louis Transit Co.* (1904) 108 Mo. App. 152, fraud, *Fifth Ave. Bank* v. *Forty-second St. etc. R. R. Co.* (1893) 137 N. Y. 231, and libel. *Howe Machine Co.* v. *Souder* (1877) 58 Ga. 64. This extends to unauthorized as well as authorized acts done by an agent within the scope of his apparent authority, *Fifth Ave. Bank* v. *Forty-second St. etc. R. R. Co. supra; Dwyer* v. *St. Louis Transit Co. supra,* being but the application to artificial persons of the well known rules of tort liability attaching to natural principals. Burdick, Torts (2nd Ed.) 154. A corporation is therefore responsible

for a libel published by its agent in the course of his duties though in excess of his authority. *Fogg* v. *Boston & Lowell R. R.* (1889) 148 Mass. 513; *Citizens' Life Assurance Co.* v. *Brown* (1904) 90 L. T. [N. S.] 739. But, although it seems that a corporation may be held liable for slander which it directs, see *Hussey* v. *Norfolk & So. R. R. Co.* (1887) 98 N. C. 34; Odgers, Libel and Slander 583, it escapes all responsibility for an unauthorized slander. *Duquesne Distributing Co.* v. *Greenbaum* (1901) 135 Ky. 182. No satisfactory reason can be advanced for holding, as a matter of law, that the rule *respondeat superior,* admittedly applicable in case of other unauthorized torts, as libel, committed by an agent within the field of his duty, is not to govern in the case of slander so uttered, *Rivers* v. *Yazoo etc. R. R. Co.* (1907) 90 Miss. 196, and this seems to be but another unfortunate distinction between the written and unwritten forms of defamation. The two doctrines nevertheless exist side by side in the same jurisdiction, see *Behre* v. *Nat'l Cash Register Co.* (1896) 100 Ga. 213, and the principal case accords with the weight of authority.

COVENANTS—TITLE AND WARRANTY—COUNSEL FEES AS DAMAGES.—A grantee of land evicted by the holder of a paramount title after having given notice of the eviction action to the grantor, sued the latter on covenants for title and general warranty. *Held,* he might recover *inter alia* counsel fees expended in defence of the title. *Jones* v. *Balsley* (N. C. 1910) 69 S. E. 827.

By a supposed analogy to the ancient action of *warrantia chartae,* the damages for a breach of a covenant for title or warranty are limited by a few decisions to consideration money and taxable costs incurred in defence. *Holmes* v. *Sinnickson* (N. J. 1836) 3 J. S. Green 313; *contra, Staats* v. *Ex'rs of Ten Eyck* (N. Y. 1805) 3 Caines 111, 118. These elements at least seem to be universally allowed irrespective of notice to the covenantor of the eviction proceedings. *Morris* v. *Rowan* (N. J. 1839) 2 Harr. 304. Where notice has in fact been given, the sometimes very considerable item of counsel fees is also a well recognized element of damages, Rawle, Covenants for Title § 200, though a few cases hold that if the covenantor ignores notice given by the covenantee the latter, if he defends, does so at his peril. *Terry* v. *Drabenstadt* (1871) 68 Pa. St. 400, 403; *contra, Rolph* v. *Crouch* (1867) L. R. 3 Ex. 44. In the absence of notice, the more generally accepted rule seems to be that counsel fees are not recoverable; Rawle, Covenants for Title § 200; but many authorities disregard the question of notice. *Harding* v. *Larkin* (1886) 41 Ill. 413, 420; *McAlpin* v. *Woodruff* (1860) 11 Oh. St. 120, 130; *Staats* v. *Ex'rs. of Ten Eyck supra.* On this point the better view would seem to be that regardless of notice reasonable attorney's fees should be held to be quite as proper an element of damages as taxable costs, because equally within the contemplation of the parties and equally essential to a complete indemnification of the covenantee, and that the only operation of failure to give notice should be to increase the burden of proof laid upon the plaintiff in showing such damages. *Ryerson* v. *Chapman* (1877) 66 Me. 557, 562; *Smith* v. *Compton* (1832) 3 B. & Ad. 407. In the principal case, however, there appears to have been sufficient notice, and the decision therefore seems to be beyond criticism.

DAMAGES—INSTALLMENT CONTRACT OF SALE—SUIT BY VENDOR.—The purchaser of hops under a five-year installment contract sought to

rescind. The vendor sued for installments of purchase money payable before delivery, and recovered judgment. The action was pending when the time for the corresponding delivery of hops arrived. The market price then exceeded the contract price. The vendor made no tender, but held the hops for six months and sold them, the market price having then dropped one half. The vendee sought to restrain the enforcement of the judgment. *Held,* affirming by an evenly divided court the judgment below, no injunction should issue. *Livesley et al.* v. *Krebs Hop Co.* (Or. 1910) 112 Pac. 1. See Notes, p. 357.

DIVORCE—ALIMONY—LIABILITY FOR DEBTS OF WIFE.—A creditor of a divorced wife brought a judgment creditors' action to obtain the alimony assigned to her and which was in her attorney's possession. The debt was contracted before the decree granting the alimony was handed down. *Held,* the alimony could not be subjected to the payment of the pre-existing debts of the wife. *Fickel* v. *Granger* (Oh. 1910) 93 N. E. 527.

Alimony is a maintenance afforded to the wife where the husband refuses to give it or where from his improper conduct he compels her to separate from him. *Wallingsford* v. *Wallingsford* (Md. 1825) 6 Harr. & J. 485. Since it has its foundation in the husband's duty of support, *Kingman* v. *Carter* (1898) 8 Kan. App. 46, the divorce and consequent separation do not relieve him from the performance of this marital obligation but only change the form and measure of the duty. *Romaine* v. *Chauncey* (1892) 129 N. Y. 566. Moreover the judgment of alimony is not considered a debt, *Pain* v. *Pain* (1879) 80 N. C. 322; *contra, Sheffer* v. *Boy* (1884) 5 Pa. Co. Ct. 158, but remains subject to the continuing authority of the court and may be altered at its discretion even to the extent of cancelling arrears. See *Guenther* v. *Jacobs* (1878) 44 Wis. 354. In the exercise of this power of control the court will refuse to lend its aid in behalf of a creditor of the wife where such action will result in the application of the fund to a purpose other than that for which it was granted. *Jordan* v. *Westerman* (1886) 62 Mich. 170. Accordingly where it is sought to subject alimony to the payment of debts of the wife contracted before the issuance of the decree, for which the husband would not have been liable before divorce, relief will be refused because the court would be imposing an unfounded obligation upon the husband and at the same time perverting the decree from the purpose authorized by law. *Romaine* v. *Chauncey supra.* The principal case in adopting this view has the support of all jurisdictions where alimony is not regarded as a debt and would seem correct on principle.

EASEMENTS—DEEDS—CONSTRUCTION.—The plaintiff's predecessor in title granted all his right, title and interest in all lands to be taken, used or affected by the construction or operation of the defendant's railroad, allowing the defendant to change the bed of the river, and releasing it from all claims for damages. The plaintiff sued for damages caused by water and débris cast on his land as a result of the change in the channel. *Held,* the deed was a conveyance in fee to the defendant with easements in such remaining land as should be affected by the construction or operation of the railroad. *Allerton* v. *N. Y. L. & W. Ry. Co.* (N. Y. 1910) 93 N. E. 270.

If the deed is construed to be a conveyance of the land actually taken by the defendant, accompanied by a mere personal release of all

claims for damages, since there was no privity of estate, the latter would clearly not be a covenant the burden of which would run with the land. *Notes to Spencer's Case* (8th Ed.) 1 Smith L. C. part 1, 168. But where the terms of a covenant can be read as a grant of an incorporeal hereditament, no precise words being necessary to such operation, it becomes unnecessary to determine whether as a covenant its burden runs with the land. *Rowbotham* v. *Wilson* (1860) 8 H. L. C. 348. Construing the instrument properly as a whole it is evident that the release is referable to the results of the right given the defendant to construct the road as it sees fit on the land taken and to change the bed of the river. The grantor's plain intention was to subject his unconveyed lands to such burdens as these results might entail. Such servitude is not objectionable as creating rights unconnected with the use or enjoyment of land, *cf. Ackroyd* v. *Smith* (1850) 10 C. B. 154, nor as an entirely new species of easement, *Simpson* v. *Mayor of Godmanchester* L. R. [1896] 1 Ch. 214, since it is clearly akin to the easement, recognized both in England and the United States, of discharging water, with or without refuse matter, upon another's land. *Bushnell* v. *Proprietors* (1860) 31 Conn. 150; Gale, Easements (7th Ed.) 20. The principal case, therefore, is sound in theory, and is in accordance with the New York tendency not to regard easements with undue stringency. *Van Rensselaer* v. *Albany R. R. Co.* (1876) 62 N. Y. 65.

EVIDENCE—ADMISSIONS—EXTRA-JUDICIAL ADMISSIONS AS AFFIRMATIVE EVIDENCE.—The defendant introduced in evidence an extra-judicial admission of the plaintiff material to a point in issue and the trial court instructed the jury that it could be considered only for the purpose of discrediting the plaintiff's testimony. *Held,* on appeal, the charge was erroneous. *Louisville & N. R. Co.* v. *Bradford* (Ala. 1910) 69 S. E. 870.

Although the extra-judicial admissions of a party to the action are admissible for the purpose of discrediting his present position, Wigmore, Evidence §§ 1048-1058, they may incidentally have effect as affirmative evidence. *Joslyn* v. *Cadillac Automobile Co.* (1910) 177 Fed. 863; *Conant* v. *Evans* (1909) 202 Mass. 34. Where they are immaterial to the issues, it is proper for the court, in instructing the jury, to limit the consideration of such evidence to the purpose for which it was admitted. *Mann* v. *Balfour* (1905) 187 Mo. 290; see *Baltimore & O. R. Co.* v. *Rambo* (1893) 59 Fed. 75; *Shoninger* v. *Day* (1893) 53 Mo. App. 147. It has been suggested that the same rule should apply even where the admissions are material, unless against interest at the time when made. See Wigmore, Evidence § 1048. Although such evidence would have a greater degree of probative value, *Levy* v. *Gillis* (Del. 1897) 1 Penne. 119, the evidence once admitted, being material, its weight would seem to be a matter for the jury. *Bruger* v. *Ins. Co.* (1906) 129 Wis. 281; *Moore* v. *Grayson* (1901) 132 Cal. 602. In the absence of the elements of an estoppel, *Newcomb* v. *Jones* (1889) 37 Mo. App. 475, even though the admissions are not explained or contradicted by other evidence, *Ayers* v. *Metcalf* (1866) 39 Ill. 307, they are not necessarily conclusive or even *prima facie* evidence. *Stephens* v. *Vroman* (N. Y. 1854) 18 Barb. 250. They may, however, control the conclusions if the evidence is conflicting, *Union Mut. Life Ins. Co.* v. *Masten* (1880) 3 Fed. 881, and are even sufficient in themselves to sustain a verdict, *Ripley* v. *Paige* (1839) 12 Vt. 353; *North* v. *Zerwick* (1901) 97 Ill. App. 306, though they will

seldom justify its direction. *Texas & P. Ry. Co.* v. *Fambrough* (Tex. 1900) 35 S. W. 188. The decision in the principal case is sound, since the charge below denied the effect of the admission as affirmative evidence.

EVIDENCE—HOMICIDE—DYING DECLARATIONS.—The defendant was tried for the murder of one Tyre. In the same affray Tyre had killed one Williams. The defendant sought to introduce as evidence the dying declaration of Williams. *Held,* the evidence was inadmissible. *Miliken* v. *State* (Ga. 1910) 69 S. E. 915.

Dying declarations are admissible only in cases of homicide, *Railing* v. *Comw.* (1885) 110 Pa. St. 100; *Rex* v. *Lloyd* (1830) 4 Carr. & P. 233, or in cases where the death of the declarant is a necessary element of the crime. *Montgomery* v. *State* (1881) 80 Ind. 338. The orthodox rule for the admission of such testimony is that the death of the declarant must be the immediate subject of judicial investigation in the action in which the dying declaration is sought to be introduced as evidence. *Mora* v. *People* (1893) 19 Colo. 255; *State* v. *Westfall* (1878) 49 Ia. 328. This rule has been so far relaxed in some jurisdictions as to allow the admission of such declarations where the declarant was killed by the same act which caused the death under investigation, as where several have met death by partaking of the same poisoned food, *State* v. *Terrel* (S. C. 1859) 12 Rich. 321; *Rex* v. *Baker* (1837) 2 M. & R. 53, or have been shot at approximately the same time by the defendant, *State* v. *Wilson* (1871) 23 La. Ann. 558; *State* v. *Bohan* (1875) 15 Kan. 407, but it has apparently never been so extended as to justify the introduction of a dying declaration made by one killed in a general affray but for whose death it is not claimed that the defendant is responsible. *Poteete* v. *State* (Tenn. 1878) 9 Baxt. 261. It is clear, therefore, that in excluding the evidence offered in the principal case the court was unquestionably correct.

EVIDENCE—LIBEL AND SLANDER—PROOF OF MALICE BY OTHER PUBLICATIONS.—In an action for libel the defendant moved for an order striking out all reference to other libelous statements. There was no connection between the publications and they differed as to subject matter. *Held,* the motion should be granted. *Burkan* v. *Musical Courier Co.* (N. Y. 1910) 125 N. Y. Supp. 1059.

Actual malice is to-day a ground for the recovery of exemplary damages in libel or slander suits. *Bingham* v. *Gaynor* (N. Y. 1909) 135 App. Div. 426. While the relevancy of publications made at other times to show actual malice is indisputable, 1 Wigmore, Evidence § 404, the courts differ widely as to what publications are admissible. In England any words, whenever uttered and whether actionable or not, are competent evidence to prove the *animus,* but the jury are to be instructed not to award damages on these words as though sued on. Odgers, Libel and Slander (4th Ed.) 326. In this country some courts have adopted the English rule; *Register Newspaper Co.* v. *Worten* (Ky. 1908) 111 S. W. 693, 698; while the weight of authority is in favor of admitting, with the proper caution to the jury, prior and contemporaneous publications or subsequent repetitions, whether they might be recovered on separately or not, if of substantially the same defamatory charge. *Post Pub. Co.* v. *Hallam* (1893) 59 Fed. 530; 1 Wigmore, Evidence § 406. Since all defamatory utterances regarding the plaintiff equally indicate malice and tend equally to prejudice the

defendant, the English doctrine seems more rational. See 1 Wigmore, Evidence § 405. In New York, apparently, recovery on other statements than the one sued on must be barred by the Statute of Limitations, *Titus* v. *Sumner* (1870) 44 N. Y. 266, or such statements must be repetitions, *Distin* v. *Rose* (1877) 69 N. Y. 122, made before the commencement of the action. *Daly* v. *Byrne* (1879) 77 N. Y. 182. Such statements are provable even though not alleged in the complaint. *Cruikshank* v. *Gordon* (1890) 118 N. Y. 178; but see *Stuart* v. *N. Y. Herald Co.* (N. Y. 1902) 73 App. Div. 459. Since in the principal case the additional statements alleged were not repetitions, the result reached is in accord with the rule of its jurisdiction.

FRAUD—CORPORATIONS—LIABILITY OF OFFICERS FOR MISREPRESENTATION.—The plaintiff purchased bonds of a corporation, being misled by a trust mortgage prepared by the company's counsel in which its property was described as "lands." The defendant, president of the company, signed the mortgage knowing that it did not own the land in fee, relying on the correctness of the terms used. *Held,* the defendant was not liable in deceit. *Slater Trust Co.* v. *Gardiner* (C. C. S. D. N. Y. 1910) 183 Fed. 268.

The court assumes that a man is responsible for his false statements, in spite of his belief in their truth, if he has no reasonable grounds therefor. This doctrine is accepted in several States, *Johnson* v. *Gulick* (1896) 46 Neb. 817, and seems preferable to the English rule, followed in the majority of American jurisdictions, *Wilkins* v. *Standard Oil Co.* (1904) 70 N. J. L. 449, that a man is not liable for his false statements if he believes them to be true, and that the absence of reasonable grounds for such belief has merely evidential weight against him. *Derry* v. *Peek* (1889) L. R. 14 A. C. 337, overruling *Peek* v. *Derry* (1887) L. R. 37 Ch. Div. 541, 565, which pronounced the better doctrine. See 5 L. Q. Rev. 410; Director's Liability Act (1890) 62 L. T. [N. S.] CXXVII. When a statement is made as of a man's own knowledge, however, all question of belief in its truth becomes immaterial. 5 COLUMBIA LAW REVIEW 250; *Chatham Furnace Co.* v. *Moffatt* (1888) 147 Mass. 403. Proceeding therefore on the further assumptions of the court that the defendant was not negligent and that his belief rested upon reasonable grounds, the decision would still not appear to be justifiable unless on the ground that no reasonable man could consider this a representation as of the defendant's own knowledge. A question of fact is here involved, susceptible of a contrary answer, *Lynch* v. *Southern Land Co.* (1909) 135 Mo. App. 672, which seems more consistent with a correct standard of commercial morality. Since the plaintiff relied on the representation in the mortgage, the fact that the title was of record in Missouri is no bar to his recovery, *Clark* v. *Edgar* (1882) 12 Mo. App. 345, nor, in most American jurisdictions, the fact that he did not purchase the bonds directly from the company. *Cross* v. *Sackett* (N. Y. 1858) 2 Bosw. 617; *cf. Peek* v. *Gurney* (1874) 43 L. J. [N. S.] Ch. 19, 36.

HIGHWAYS—ENCROACHMENT—ESTOPPEL.—Abutting owners acting with due diligence made valuable improvements on the supposition that an alley line acquiesced in by the public since the platting of the town in 1823 was the true line. The town proposed to shift the line four feet north. *Held,* the public was estopped from showing that the line as acquiesced in was not the true line. *Town of New Castle et al.* v. *Hunt et al.* (Ind. 1910) 93 N. E. 173.

The sound rule supported by a majority of the courts is that the conduct of a town which holds a highway in trust for the public cannot estop the public from asserting its highway rights. 8 COLUMBIA LAW REVIEW 143; *Webb* v. *City of Demopolis* (1892) 95 Ala. 116. This rule has been departed from in some jurisdictions in cases where the encroachment is innocent and results in only slight inconvenience to the public, *People ex rel.* v. *City of Rock Island* (1905) 215 Ill. 488, while the destruction of the improvements would cause great loss to the abutting owners. *City of Chicago* v. *Illinois Steel Co.* (1907) 229 Ill. 303. This so-called estoppel has in some States been confined to cases of apparent abandonment of a whole highway as distinguished from mere non-user of a part thereof, *Baldwin* v. *Trimble* (1897) 85 Md. 396; *Ulman* v. *Avenue Co.* (1896) 83 Md. 130, and seems only justifiable as a rule of expediency to be applied in extreme cases. 2 Dillon, Munic. Corp. (3rd Ed.) § 667. It would seem, however, that in justice some compensation should be made. Where improvements have been made innocently on land of an individual, equity has in a few instances compelled compensation by the owner of the land. *Bright* v. *Boyd* (1841) 1 Story 478; (1843) 2 Story 605; *Pearl Township* v. *Thorp* (1903) 17 S. D. 288. Similarly it has been urged that while the doctrine of estoppel is inapplicable to highway encroachments, the improver who has acted without fault should not be deprived of the value of his erections and hence the public should be relegated to its power of eminent domain to condemn such improvements; *Ralston* v. *Town of Weston* (1899) 46 W. Va. 544; and the solution seems on practical grounds a desirable one. The result reached in the principal case, however, works no hardship and was to be expected in view of earlier decisions in the jurisdiction. *Hamilton* v. *State* (1885) 106 Ind. 361.

HUSBAND AND WIFE—CONTRACTS BETWEEN—ENFORCEMENT.—The defendant, in an action of assumpsit, pleaded that the contract was made with his wife during coverture and assigned by her to the plaintiff. Married women were by statute empowered to deal with their separate estates as though single. *Held,* though the wife's contract with her husband was valid she could not enforce it at law, and the disability could not be avoided by assignment to a third person. *Perkins* v. *Blethen* (Me. 1911) 78 Atl. 574.

The merger of the legal entities of husband and wife at common law has been generally held to effect the total extinguishment of antenuptial contracts between the parties, *Farley* v. *Farley* (1891) 91 Ky. 497, unless made in contemplation of marriage and by their terms not to be performed during coverture, *Milbourn* v. *Ewart* (1793) 5 T. R. 381, so that such choses in action could not be enforced after the termination of the relationship by death or divorce. *Smiley* v. *Smiley's Adm'r* (1869) 18 Oh. St. 543. Under statutes enabling a married woman to own property, however, by the better view the common law fiction of unity is so far abrogated that a chose in action, valid in its inception, may be enforced by the wife against the personal representative of her deceased husband, *Barton* v. *Barton* (1870) 32 Md. 214, upon the theory that there is a mere suspension of the remedy during coverture because of the disability to sue incident to the marital status. *Cf. Spooner* v. *Spooner* (1891) 155 Mass. 52. It follows that when the validity of contracts between husband and wife has received statutory recognition, the incapacity to enforce them, even if conceded to survive the removal of the incapacity to contract, see *Mathewson* v.

Mathewson (1906) 79 Conn. 23; *contra, Flenner* v. *Flenner* (1868) 29 Ind. 564, is purely personal and should not on principle be held to modify the nature of the chose in action, as it must if it renders it unenforceable at law in the hands of a stranger. See *Russ* v. *George* (1864) 45 N. H. 467; *Spooner* v. *Spooner supra.* The decision in the principal case therefore seems unsound.

HUSBAND AND WIFE—SEPARATION AGREEMENT—ENGLISH DOCTRINE.—A wife sued her husband for arrears on an agreement for separation entered into after an assault by the husband that would have justified her in bringing proceedings before a magistrate. *Held,* the fact that she had refrained from taking such proceedings was a sufficient consideration to support the agreement of separation, which further was not void as against public policy. *Hulse* v. *Hulse* (1910) 103 L. T. 804.

There has long been a conflict between the English and American courts in regard to separation deeds, the American authorities considering them void as attempts to effect the separation, but valid in respect to collateral undertakings, while the English decisions regard them as *per se* not against public policy. 1 COLUMBIA LAW REVIEW 555. Irrespective of its validity as regards public policy the deed must fulfill the ordinary requirements of a contract and there must be, therefore, both the power to contract and a consideration. Bishop, Mar. Div. & Sep. §§ 1279, 1286. It was early settled in England that a compromise of a suit for divorce was sufficient consideration for the separation agreement, *Wilson* v. *Wilson* (1845) 14 Sim. 405, and later the contractual capacity of the wife was worked out on the principle that having the power to sue for divorce or separation she necessarily had the power to compromise the suit. *Besant* v. *Wood* (1879) L. R. 12 Ch. Div. 605. Still later it was held that this power to compromise was not confined to pending matrimonial actions but that mutual proceedings for assault once begun might be compromised by such an agreement, without the intervention of trustees. *McGregor* v. *McGregor* (1888) 21 Q. B. D. 424. The principal case has gone farther and supports the agreement on the ground that, as the wife could have sued for assault, she could agree to a valid separation although no action had been commenced or apparently even contemplated; and the extension seems on principle a proper one. In the previous cases the consideration, being the discontinuance of an action already commenced, was of course executed and the court in the principal case accordingly treated as consideration the actual refraining from suit rather than the promise to refrain. In view, however, of the wife's power to bind herself personally in such an agreement, *Besant* v. *Wood supra,* no reason is seen for requiring other consideration than the mutual promises of the parties.

INNKEEPERS—LIABILITY FOR BAGGAGE—BURDEN OF PROOF.—A former guest of the defendant's hotel sued for the value of baggage which had been retained by the defendant a year previously on the guest's departure without paying her bill, and which had since been lost. *Held,* her long and unexcused failure to inquire or take action regarding the baggage was evidence of contributory negligence and threw upon her the burden of proving actual negligence on the part of the defendant. *Giblyn* v. *Hanf* (1911) 126 N. Y. Supp. 581.

Although there is a conflict of authority as to the precise extent of an innkeeper's liability for the loss of a guest's baggage, *Norcross* v.

Norcross (1865) 53 Me. 163; *Johnson* v. *Chadbourn Finance Co.* (1903) 89 Minn. 310, it seems to be established that this liability ceases with the termination of the relation of guest and innkeeper, or upon the lapse of a reasonable time thereafter. Wharton, Negligence § 687; *Adams* v. *Clem* (1870) 41 Ga. 65. Thereupon the innkeeper becomes a bailee, gratuitous or otherwise as the case may be, see *Clark* v. *Ball* (1905) 34 Colo. 223, and where the bill is unpaid, he has a lien upon the property. If he retains it in pursuance of the lien, as he seems to have done in the principal case, he is bound to use ordinary diligence in caring for it, *Murray* v. *Marshall* (1886) 9 Colo. 482, and in case of loss there is a *prima facie* presumption of negligence on his part, *Murray* v. *Marshall supra,* imposing upon him the burden of showing the use of due care. *Murray* v. *Clarke* (N. Y. 1866) 2 Daly 102. Under the above principles the judgment in the principal case should have been for the plaintiff. It is difficult to conceive upon what theory mere lapse of time should be held as a matter of law to be evidence of negligence on the part of the plaintiff proximately contributing to a loss the cause of which was not attempted to be shown, and it is further submitted that any reason in principle or justice why the burden of proof should rest upon the innkeeper, such as the fact that the cause of the loss is usually peculiarly within his knowledge, would be unaffected by the lapse of time.

INSURANCE—CONDITIONS—TITLE TO PREMISES.—In a suit on a policy of insurance it appeared that the building covered thereby stood on ground not owned by the insured. The policy provided that under such circumstances the policy should be void. *Held,* no fraud on the part of the insurer being shown, he should be allowed to recover. *German Fire Ins. Co.* v. *Herbertson* (Col. 1911) 112 Pac. 690.

In the absence of express conditions it is held that while a direct misrepresentation or concealment amounting to fraud on the part of the insured will avoid the policy, *Bulkley* v. *Protection Ins. Co.* (1835) 2 Paine C. C. 82; *Catron* v. *Tenn. Ins. Co.* (Tenn. 1845) 6 Humph. 176, yet if no information is asked by the insurer or volunteered by the insured the policy will be good to the extent of the latter's actual interest. *Niblo* v. *No. American Ins. Co.* (N. Y. 1848) 1 Sandf. 551. Where conditions as to title are present, however, no reason appears why the general rule, that the insured will be bound by conditions in a policy accepted by him in the absence of fraud by the insurer, see *Wierengo* v. *American Ins. Co.* (1894) 98 Mich. 621, should not be given full effect; and so a number of courts have held. *Parsons, Rich & Co.* v. *Lane* (1906) 97 Minn. 98; *Rohrbach* v. *Germania Ins. Co.* (1875) 62 N. Y. 47; *Waller* v. *Northern Ins. Co.* (1881) 10 Fed. 232. Many jurisdictions have, nevertheless, reached a contrary result on the theory adopted in the principal case that where no inquiries are made by the insurer there is a conclusive presumption that the facts as to the title are known to the agent. *Hanover Ins. Co.* v. *Bohn* (1896) 48 Neb. 743; *Phila. Tool Co.* v. *British Assn. Co.* (1890) 132 Pa. St. 236. Where the agent has in fact such knowledge there is valid ground for inferring a waiver or estoppel, *Manhattan Ins. Co.* v. *Weill* (Va. 1877) 28 Gratt. 389, but to indulge a presumption to this effect introduces an unjustifiable fiction. *Parsons, Rich & Co.* v. *Lane supra,* 115. The soundness of the better reason occasionally given, that the equality between the contracting parties recognized by the common law does not in fact exist between insurer and insured, *Glens Falls Ins. Co.* v. *Michael* (Ind. 1905) 74 N. E. 964, 969, is also questionable as applied

to modern policies. See *Quinlan* v. *Providence Ins. Co.* (1892) 133 N. Y. 356.

INTERSTATE COMMERCE—CONNECTING CARRIER—LIABILITY OF INITIAL CARRIER.—The Carmack Amendment to the Interstate Commerce Act, 34 Stat. at L. 584, 595, provides that a carrier receiving goods for transportation to points beyond its own line, shall be liable for loss occurring on any connecting line. The plaintiff, who shipped goods by the defendant road under an agreement limiting the defendant's liability to loss on its own line, sued for a loss occurring on the line of a connecting carrier. *Held,* the statute was constitutional and the plaintiff could recover. *Atlantic Coast Line R. R. Co.* v. *Riverside Mills* (1911) 31 Sup. Ct. Rep. 164.

By the Interstate Commerce Act as amended by the Mann-Elkins Act, June 18th, 1910, § 15 par. 3, the Commission is given power to require a railroad to accept goods for shipment to points on the lines of connecting carriers. In spite of the fact that at common law a railroad was under no duty to carry to points beyond its own line, *So. Pac. Co.* v. *Interstate Com. Com.* (1905) 200 U. S. 536, 553, a statute requiring such service, although imposing a new duty which the railroad has never before held itself out to perform, would seem to be a reasonable regulation of a public service company and therefore a proper exercise of the Federal police power under the Commerce Clause. Freund, Police Power §§ 621, 622, since its object is proper and the means employed are reasonably adapted thereto. 10 COLUMBIA LAW REVIEW 55. Even where the carrier is required both to accept such shipment and to assume liability for loss on any connecting road much the same considerations are applicable, for the additional element of a restriction upon the freedom of contract, *Holden* v. *Hardy* (1898) 169 U. S. 366; 8 COLUMBIA LAW REVIEW 301, or of the imposition of liability constituting in effect a slight taking of property, *Noble State Bank* v. *Haskell* (1911) 219 U. S. 104, is not sufficient to invalidate a statute enacted in the public interest. Since the section of the statute passed upon in the principal case imposes no additional duty to accept goods, but simply requires that a carrier receiving a shipment to points beyond its line must do so on certain prescribed terms, it is *a fortiori* constitutional and the decision of the court is unquestionably sound.

MANDAMUS—OFFICERS—UNCONSTITUTIONALITY OF STATUTE AS DEFENSE.—The county treasurer, on the advice of the Attorney General of the State, had refused to pay a warrant for salary presented by the prosecuting attorney of the county; and to a petition for mandamus to compel the payment pleaded the unconstitutionality of the statute under which it was demanded. *Held,* the unconstitutionality of the act was properly raised in defense. *Wiles* v. *Williams* (Mo. 1910) 133 S. W. 1.

It is elementary that an unconstitutional statute is void, *Marbury* v. *Madison* (1803) 1 Cranch 137, 176, and will neither empower one to act nor protect him when he has acted. *Sumner* v. *Beeler* (1875) 50 Ind. 341. The presumption, however, is that the act in question is law until some one complains whose rights are affected, Cooley, Const. Lim. (7th Ed.) 232, and no one else will be heard to question its validity. *Comw.* v. *Wright* (1880) 79 Ky. 22. In general, therefore, an officer whose duties are purely ministerial may not defend against a

petition for mandamus with the plea that the statute is unconstitutional, *Comw.* v. *James* (1890) 135 Pa. St. 480, for his personal interests or rights are not affected. *Capito* v. *Topping* (1909) 65 W. Va. 587. But as the issuance of the writ is largely a matter of discretion, see *Wiedwald* v. *Dolson* (1892) 95 Cal. 450, some courts have admitted the constitutional question in order to prevent repeated litigation, *Hindman* v. *Boyd* (1906) 42 Wash. 17, 29, escape the danger of rival claimants to the same office, *Pell* v. *Newark* (1878) 40 N. J. L. 71, or afford protection to an officer responsible for the consequences of his acts. *State ex rel.* v. *Candlan* (Utah 1909) 104 Pac. 285; *cf. Ex parte Rowland* (1887) 104 U. S. 604. Accordingly, it has been held that a treasurer may properly attack the validity of the statute under which it is attempted to make him expend public moneys, because an unauthorized expenditure would subject him to liabilities and penalties, *Denman* v. *Broderick* (1896) 111 Cal. 96, 105, and would be a violation of his oath to protect the funds intrusted to him. *McDermott* v. *Dinnie* (1896) 6 N. D. 278. A treasurer, then, though a ministerial officer and subject to mandamus, has sufficient interest to justify his raising the question and the result reached in the principal case is proper.

MARRIAGE—VOIDABLE MARRIAGE—EFFECT OF ANNULMENT.—The plaintiff, after her marriage to the defendant, but before its annulment for physical incapacity, reached the age of eighteen years. After the annulment the plaintiff brought the present action in her own name relying on a statute which provided that a married woman on attaining the age of eighteen should be relieved of the disabilities of infancy. *Held,* the marriage being only voidable, the action was maintainable. *Bennett* v. *Bennett* (Ala. 1910) 53 So. 986.

A void as distinguished from a voidable marriage is invalid *ab initio* without decree of annulment, *In re Eichoff* (1894) 101 Cal. 600, though such decree may be proper and desirable. *Wightman* v. *Wightman* (1820) 4 Johns. Ch. 343. On the other hand, a voidable marriage is valid for all civil purposes until its annulment is pronounced by a competent tribunal, *Jordan* v. *Telephone Co.* (1908) 136 Mo. App. 192, and the decree can be obtained only during the lifetime of both parties. *Elliott* v. *Gurr* (1812) 2 Phil. Eccl. 16; *Tompert's Ex'r.* v. *Tomppert* (Ky. 1877) 13 Bush 326. After the decree, however, a voidable marriage is regarded as never having existed. *Sinclair* v. *Sinclair* (1898) 57 N. J. Eq. 222; see *Aughtie* v. *Aughtie* (1810) 1 Phil. Eccl. 201. No claim can be made on the husband for legal services rendered the wife in the suit, *Sinclair* v. *Sinclair supra,* and the children in the absence of statute are rendered illegitimate. 1 Bl. Com. 440; see *Faremouth* v. *Watson* (1811) 1 Phil. Eccl. 355. The decree of nullity thus differs from that of divorce which recognizes and affirms that there has been a valid marriage. Shelford, Mar. & Div. 365. Since the effect of the former is to pronounce that the relationship never existed, it is submitted that rights, dependent on such relationship for their being, cannot arise and that the parties, in the absence of questions of estoppel, should be remitted to their antenuptial status. This view is strengthened by the fact that there seems originally to have been no such distinction as that between void and voidable marriages. See *Ray* v. *Sherwood* (1836) 1 Curteis 173, 188; s. c. *ibid.* 193, 199. The decision in the principal case would therefore seem incorrect.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—UNLAWFUL EMPLOYMENT OF MINOR.—The plaintiff sued for injuries under a statute which provided for the punishment of any operator who knowingly employed any boy under fourteen years of age in any coal mine. *Held,* the plaintiff was entitled to recover. Two judges took the ground that the evidence showed the plaintiff to be free from contributory negligence because of his immaturity, while two other judges held that under the statute contributory negligence was no defence. *Norman* v. *Virginia-Pocahontas Coal Co.* (W. Va. 1910) 69 S. E. 857.

Construing similar statutes some courts hold that contributory negligence is not a defence; *Stehle* v. *Jaeger Machine Co.* (1909) 225 Pa. St. 348; *American Car Co.* v. *Armentraut* (1905) 214 Ill. 509; others maintain that a child under the statutory age is presumably incapable of appreciating the danger and yet that the question of contributory negligence is for the jury. *Marino* v. *Lehmaier* (1903) 173 N. Y. 530; *Rolin* v. *Tobacco Co.* (1906) 141 N. C. 300. At common law the employment of an infant too immature to appreciate the danger of the occupation was at the master's risk, see *Hickey* v. *Taaffe* (1887) 105 N. Y. 26, 36, the presumption being that children under fourteen years were incapable of exercising the requisite judgment and hence were not chargeable with contributory negligence. *Tutwiler Coal Co.* v. *Enslen* (1900) 129 Ala. 336. Since the statute imposes an absolute standard of duty, it seems proper to hold the master liable in tort for all proximate consequences of its violation. Regarding it as in effect a legislative declaration that children under the statutory age do not possess the discretion necessary to engage in certain dangerous occupations, *Marino* v. *Lehmaier supra,* 534, it follows that contributory negligence cannot be predicated upon their conduct. *Lee* v. *Sterling Silk Co.* (N. Y. 1905) 47 Misc. 182; reversed 115 App. Div. 589. Hence the employer's misconduct should be considered the efficient cause of the injury. *Inland Steel Co.* v. *Yedinak* (1909) 172 Ind. 423. Under this view the inquiry suggested in the principal case, whether the employee in fact possessed the necessary capacity and whether his incautious act could actually be foreseen by the master, becomes immaterial. The trend of modern authority is in favor of this position. *Inland Steel Co.* v. *Yedinak supra; cf. Nickey* v. *Steuder* (1905) 164 Ind. 189.

MUNICIPAL CORPORATIONS—REGULATION OF STREETS—REMOVAL OF RAILWAYS AS OBSTRUCTIONS.—After the expiration of the plaintiff's franchise the defendant city ordered the removal of the plaintiff's tracks from the city streets. The plaintiff, claiming that the franchise had been extended by a subsequent act of the legislature, brought an action to restrain the execution of the order. *Held,* as the city had no right to question the exercise of a franchise granted by the State, an injunction should issue. *N. Y. C. & H. R. R. R. Co.* v. *City of New York* (1911) 127 N. Y. Supp. 513. See Notes, p. 360.

NUISANCE—INJUNCTION—TEMPORARY USER.—The defendants had a prescriptive right to run their trains past the plaintiff's premises. Later, while installing electricity, they maintained a yard for changing locomotives, thereby greatly increasing the annoyance to the plaintiff by the ringing of bells and the discharge of smoke. While the yard was not to be permanent, it would be several years before the defendants could complete their other improvements and remove it. *Held,* the

plaintiff was not entitled to an injunction. *Herrlich* v. *N. Y. C. & H. R. R. Co.* (1910) 126 N. Y. Supp. 311.

At common law, acts causing substantial inconvenience to adjoining landowners are none the less a nuisance because done in a reasonable manner, and in this respect the distinction between permanent and temporary operations is repudiated. *Bamford* v. *Turnley* (1862) 3 B. & S. 62, 74, 84. In New York, however, the employment of necessary, ordinary and usually harmless means in preparing land for some lawful user is not actionable though causing consequential damage. *Booth* v. *Rome etc. R. R. Co.* (1893) 140 N. Y. 267. The soundness of this innovation upon common law principles is doubtful and it should be restricted in its application. Hence even under the New York rule it is difficult to contend that the acts in the principal case do not constitute a nuisance at law, not being an ordinary use nor done in the preparation of the land for a lawful purpose. Equity does not take jurisdiction to restrain a nuisance as of course, but only when the legal remedy is inadequate by reason of the necessity of repeated suits or because of irreparable damage. *Nelson* v. *Milligan* (1894) 151 Ill. 462. Generally when the acts are of a temporary or intermittent character and do not cause irreparable damage, the legal remedy is considered adequate. *Swaine* v. *Great Northern R. R. Co.* (1864) 4 De G. J. & S. 211; *Bentley* v. *Empire Cement Co.* (1905) 96 N. Y. Supp. 831. Under no principles of equity, however, can acts continued for several years without interruption be considered temporary, for it is apparent that only a succession of suits at law would protect the plaintiff and prevent the possible acquisition of prescriptive rights. On both legal and equitable grounds, therefore, the principal case is incorrect.

PARTNERSHIP—OBLIGATIONS ARISING FROM SALE OF GOOD WILL—RIGHT TO SOLICIT OLD CUSTOMERS.—The plaintiff and defendants were copartners. Two months before the date fixed by the articles of partnership for the dissolution of the firm, the defendants sold the plaintiff the assets and good will of the business, intending, however, as the plaintiff well knew, to establish a competing business in the same line. This they later did. The plaintiff asked an injunction to restrain the defendants from soliciting customers of the old firm. *Held,* the transfer of the goodwill was voluntary and bound the defendants to refrain from soliciting. *Von Bremen* v. *MacMonnies* (N. Y. 1910) 93 N. E. 186.

For a discussion of the principles involved and a criticism of the contrary result reached by the lower court in the same case, see 10 COLUMBIA LAW REVIEW 649.

PLEADING AND PRACTICE—MISJOINDER OF CAUSES UNDER NEW YORK CODE—PLAINTIFF SUING IN DIFFERENT CAPACITIES.—The plaintiffs sued to set aside as collusive a sale of their stock to the defendants and also certain illegal acts of the defendants, as directors, done in pursuance of a fraudulent scheme to injure the plaintiffs. *Held,* there was a misjoinder of causes of action. *Witherbee* v. *Bowles* (1911) 126 N. Y. Supp. 954.

The New York courts regard a cause of action as consisting of a single primary right in the plaintiff coupled with a single violation thereof by the defendant, *Wiles* v. *Suydam* (1876) 64 N. Y. 173; *City of New York* v. *Knickerbocker Trust Co.* (N. Y. 1905) 104 App. Div.

223; *Rogers* v. *Wheeler* (N. Y. 1903) 69 App. Div. 435, irrespective of the fact that various forms of relief are sought, *Lattin* v. *McCarty* (1869) 41 N. Y. 107; see *Hahl* v. *Sugo* (1901) 159 N. Y. 109, or that a number of defendants are severally liable to the plaintiff. *American Trading Co.* v. *Wilson, Sons & Co.* (N. Y. 1902) 37 Misc. 76. A demurrer for misjoinder will be sustained if the complaint attempts to set forth two causes of action, even though one of them be obviously defective, *People* v. *Equitable Life Ins. Co.* (N. Y. 1908) 124 App. Div. 714; *O'Connor* v. *Virginia Passenger & Power Co.* (1906) 184 N. Y. 46; *contra, Sullivan* v. *N. Y., N. H. & H. R. R. Co.* (N. Y. 1881) 1 Civ. Pro. 285. But the mere fact that in stating one cause of action allegations appropriate to another are added will not render the complaint objectionable. *Tew* v. *Wolfsohn* (1903) 174 N. Y. 272. One may, however, sue in both individual and representative capacities upon a single cause of action, provided he and the party he represents could join as parties plaintiff, see *Lawrence* v. *McKelvey* (N. Y. 1903) 80 App. Div. 514, and there is but one cause so long as the right he seeks to enforce in both capacities is for the benefit of the same person. *Moss* v. *Cohen* (1899) 158 N. Y. 240. But causes of action accruing to the plaintiff separately as an individual and as the representative of another may not be joined, *Hall* v. *Fisher* (N. Y. 1855) 20 Barb. 441; *Groh* v. *Flammer* (N. Y. 1905) 100 App. Div. 305, because, these capacities being legally distinct, the causes joined do not affect all parties as required by the Code. N. Y. Code Civ. Pro. § 484. Assuming the interpretation of the pleadings adopted by the prevailing opinion in the principal case, the result reached is a proper application of the foregoing principles.

Real Property—Covenants Running with Land—Privity.—In a deed of a right of way over farm land for railroad purposes there was a stipulation that the railroad should issue an annual pass to the grantor and his family for their several lives, with a provision that the estate granted should revert upon breach of such condition. The railroad having changed hands, the passes were discontinued and the grantor brought action on the covenant against the assignee, asking specific performance and damages. *Held*, the stipulation was both a condition subsequent and a covenant running with the land, and the plaintiff was entitled to the relief sought. *Munro* v. *Syracuse, L. & N. R. Co.* (N. Y. 1911) 93 N. E. 516.

For the burden of a covenant to run there must be privity of estate, *Hurd* v. *Curtis* (Mass. 1837) 19 Pick. 459, which at common law meant the relation of landlord and tenant. *Austerberry* v. *Oldham* (1855) L. R. 29 Ch. Div. 750. New York recognizes such privity between grantor and grantee where a rent-charge is reserved. *Van Renssalaer* v. *Read* (1863) 26 N. Y. 558. A single phrase repeated in a deed, however, cannot properly be construed as both a reservation of a rent-charge and as a covenant to pay such rent. See *Hurd* v. *Curtis supra*. Hence, while it does not seem an unjustifiable extension of common law principles to regard an annual railroad pass as a rent, see *Gilmer* v. *Mobile etc. Ry. Co.* (1885) 79 Ala. 569, the double construction given to the promise in the principal case seems incorrect. Nor does the suggestion that the condition supplies the requisite privity sustain the result reached, for a condition reserved is not an estate and cannot therefore support a covenant. The grant was of an ease-

ment, however, and by the authority of some States this gives rise to privity, *Morse* v. *Aldrich* (Mass. 1837) 19 Pick. 449; *Fitch* v. *Johnson* (1882) 104 Ill. 11, a doctrine never as yet passed on in New York. Under this view the agreement to give passes, considered as a covenant to pay rent, might well run, *Gilmer* v. *Mobile etc. Ry. Co. supra,* as no reason appears why a rent may not attach to an incorporeal as well as to a corporeal interest in land. On this ground alone, it is submitted, the principal case may be supported. For aside from the question of the defendant's liability on the covenant, the view that the mere agreement created a rent-charge enforceable in equity seems somewhat strained.

REAL PROPERTY—RESTRAINTS ON ALIENATION—VALIDITY.—A testator devised real estate in equal shares to his children and to the children of those who were dead, and provided for an executory devise over in case any devisee alienated or devised his portion to any one other than a descendant of the testator or than the wife or husband of some descendant for life, without the consent of all descendants then living and of full age. *Held,* the executory devise was an invalid restraint on alienation. *Manierre* v. *Welling* (R. I. 1911) 78 Atl. 507. See Notes, p. 365.

SALES—CONDITIONAL SALES—RIGHTS OF BONA FIDE PURCHASERS.—The plaintiff sold wagons to a retailer reserving title, knowing that they were bought to be resold. The defendants innocently purchased the vendee's stock including the wagons. *Held,* the plaintiff was estopped to assert its title. *Bass, Heard & Howle* v. *International Harvester Co.* (Ala. 1910) 53 So. 104.

A conditional sale is generally regarded as valid and although the vendor may ordinarily follow its subject-matter even into the hands of a *bona fide* purchaser, Burdick, Sales (2nd Ed.) 187, there is an obvious exception where the vendor expressly or impliedly authorizes his vendee to resell, *Spooner* v. *Cummings* (1890) 151 Mass. 313, for by his direction his title is transferred to the purchaser. *Winchester Wagon Works* v. *Carman* (1887) 109 Ind. 31. Where, however, the original vendee transcends his authority, as by selling in bulk instead of at retail, the vendor's claim to the goods cannot be defeated on grounds of agency, *Lett* v. *Moline Plow Co.* (Ind. 1910) 91 N. E. 978, and he may assert his title unless estopped to do so by reason of his having clothed his vendee with the *indicia* of ownership, *cf. Pickering* v. *Busk* (1812) 15 East 38, or having permitted him to deal with the goods in a way inconsistent with a less right. *Pickard* v. *Sears* (1837) 6 Ad. & E. 469; 8 COLUMBIA LAW REVIEW 233. The reason of the rule would seem to be that one who knowingly or negligently places another in such a position that third persons acting diligently may be defrauded, ought to bear the loss due to resulting fraud. 1 Smith's L. C. (8th Ed.) 32. Consequently, if the conditional vendor knows that the goods are bought to be resold and nevertheless permits the vendee to deal with them as his own for that purpose, he will be estopped to assert his title against a purchaser without notice. *Ludden* v. *Hazen* (N. Y. 1860) 31 Barb. 650; *cf. Jermyn* v. *Schweppenhauser* (1901) 68 N. Y. Supp. 153. On principle, the result should be the same whether the defendant has bought a single article or the entire subject-matter of the conditional sale and the principal case wisely ignores

such a distinction. *Columbus Buggy Co.* v. *Turley* (1896) 73 Miss. 529; *contra, Burbank* v. *Crooker* (Mass. 1856) 7 Gray 158.

STATUTE OF FRAUDS—INTERESTS IN LAND—PAROL MODIFICATION OF WRITTEN CONTRACT.—The defendant contracted to convey certain land to the plaintiff. Later the defendant agreed orally to convey to X instead of to the plaintiff and tendered a conveyance. The plaintiff sued on the written contract and the defendant pleaded a tender under the oral modification. *Held,* the defendant having fully performed the modified agreement, the Statute of Frauds did not apply. *McKinley* v. *Macbeth* (Minn. 1911) 129 N. W. 216.

In general an oral modification of a contract within the Statute of Frauds is no defense to an action on the written contract, *Noble* v. *Ward* (1867) L. R. 2 Ex. 138; *cf. Thompson* v. *Thompson* (1900) 78 Minn. 379, nor can an action be maintained on the modified agreement. *Clark* v. *Fey* (1890) 121 N. Y. 470; *Goss* v. *Lord Nugent* (1833) 5 B. & Ad. 58. In the case of a parol alteration of such a contract for the sale of goods, two situations may arise. If the new agreement involves no transfer of title to goods and hence is not a sale within the Statute, it may be sued on or proven in defense like a mere rescission. *Wulschner* v. *Ward* (1888) 115 Ind. 219. Again if a substituted contract of sale is made, part performance amounting to delivery and acceptance should render it provable by parol. See *Moore* v. *Campbell* (1854) 10 Ex. 323. Hence the doctrine that an accepted accord and satisfaction is not within the Statute. *Leather-Cloth Co.* v. *Hieronimus* (1875) L. R. 10 Q. B. 140. In connection with contracts for the sale of land different considerations seem applicable. Since such a contract passes an equitable interest in the land, *Daire* v. *Deversham* (1663) Nelson 76, and equitable interests are within the Statute, *Dougherty* v. *Catlett* (1889) 129 Ill. 431, a release of the vendor's obligation would seem to be of itself a contract for the sale of land. Even were this not so, where as in the principal case the release, itself a promise, Anson, Contracts (2nd Ed.) 415, is given as consideration for a promise to convey land the whole contract is obviously within the Statute. And since by the better view complete performance by the vendor does not remove the bar of the Statute where interests in land are concerned, *Cocking* v. *Ward* (1845) 1 C. B. 858; *contra, Nutting* v. *Dickinson* (Mass. 1864) 8 Allen 540, it follows that the decision in the principal case is unsound on principle, though not without support among the authorities. *Long* v. *Hartwell* (1876) 34 N. J. L. 116.

STATUTE OF FRAUDS—PROMISE TO ANSWER FOR ANOTHER'S DEBT—WHEN COLLATERAL.—The defendant, a large stockholder in a corporation, promised to become personally responsible for merchandise delivered and charged to the company by the plaintiff. *Held,* the Statute of Frauds was a good defence, for the defendant's promise was collateral since his leading object was not to benefit himself. *Hurst Hardware Co.* v. *Goodman* (W. Va. 1910) 69 S. E. 898. See Notes, p. 355.

TORTS—ACTION FOR ALIENATION OF AFFECTIONS—EFFECT OF DIVORCE.—The plaintiff, a guilty divorced party, sued the defendant for alienating his wife's affections, and attempted to impeach the decree on the ground that it was collusively obtained. A statute deprived such a party of all rights acquired by the marriage. *Held,* the right of action for alienation of affections was one acquired by the marriage,

and the plaintiff as a party to a collusive divorce could not impeach the decree. *Hamilton* v. *McNeill* (Ia. 1911) 129 S. W. 480. See Notes, p. 367.

WILLS—CLASS GIFTS—CONSTRUCTION.—The testatrix devised real property to trustees to sell and divide the proceeds equally between "the nephews and nieces of my late husband living at the time of his death." At the date of the will there were nine such nephews and nieces, whose parents were apparently then living; five of them died in the life of the testatrix. *Held,* the shares of those deceased lapsed into the residue, the gift not being to a class. *In Re King's Estate* (N. Y. 1910) 93 N. E. 484.

Since there is survivorship among the members of a class the doctrine of lapse does not apply. 1 Jarman, Wills 431. While the unequivocal intention of the testator to have certain designated persons take as a class will be given effect, *Jackson* v. *Roberts* (Mass. 1860) 14 Gray 546, generally it is essential that the number of persons to be included in the class at the time of distribution be uncertain when the will is made. *Herzog* v. *Title Guarantee & Trust Co.* (1903) 177 N. Y. 86, 97. It follows that when members of a class are numbered or specifically named the gift ceases to be to a class and there may be a lapse. See *Cruse* v. *Nowell* (1858) 4 Drew. 215. A gift may be to a class, however, whether the number of those who may take is subject to fluctuation by increase and decrease, *Ayton* v. *Ayton* (1787) 1 Cox 327, or by diminution only. *Viner* v. *Francis* (1789) 2 Cox 190. Thus a gift to "the present born children of H. L." or to "the children of the late M. C." is a gift to a class, though obviously there could be no increase in the members of the class. *Leigh* v. *Leigh* (1854) 17 Beav. 605; *Viner* v. *Francis supra.* It is difficult to distinguish these gifts from that in the principal case, for while in both the maximum class membership is fixed at the time of the will by reference to an event antecedent to its writing, there is no such prior time specified after which there may not be diminution, *Dimond* v. *Bostock* (1875) L. R. 10 Ch. 358, unless, indeed, the words "living at the time of his death" so operate. In case of a gift to "children" such words are not required as a restriction upon the increase, and therefore to give them effect the gift must be construed as to individuals. A gift to "nephews and nieces" whose parents are living, however, can only be saved from fluctuation by increase by some such words, which therefore may be given effect without departing from established principles of construction. While the principal case is not free from doubt, it seems that the contrary result, reached in *Dimond* v. *Bostock supra,* is more in accord with these principles.